benefit, should be safely and securely guarded, and failing to do so, his liability attached, and the jury should have been told so. The city also excepted to so much of the said charge of the Court, as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury. The city was not in fault, and this exception was properly taken.

The judgment below is reversed, with instructions to award a *venire de novo*.

Supreme Court of Illinois.

JAMES B. GORTON, APPELLANT, *vs.* JOHN M. BROWN, APPELLEE.

An action on the case will not lie for improperly causing a writ of injunction to be issued. The remedy is on the injunction bond.

The case of *Cox* vs. *Taylor's Administrators*, 10 B. Monroe 17, not recognised as authority.

This was an action of trespass on the case. The declaration charges, that the appellant, on the 30th day of October, 1854, falsely, maliciously, and without any reasonable or probable cause whatsoever, filed his bill of complaint on the chancery side of the Lake Circuit Court, and at the same time falsely, maliciously, and without any reasonable or probable cause whatever, caused to be issued out of, and under the seal of said court upon said bill, and the indorsement of the master in chancery of said county thereon, a writ of injunction against and to the said appellee, Brown, whereby he, the said Brown, was restrained and enjoined from selling, or in any way or manner disposing of, or interfering with a certain lot of lumber which was in said injunction alleged to be owned by said Brown and Gorton as partners. Also enjoining said Brown from collected any debts due on account of any of said lumber which had been sold on credit; which said injunction was, on or about the day of the issue thereof, served on said Brown.

Declaration also charged, that at and before time of filing said bill, said Brown was engaged in the lumber trade. That he had

a cash capital of $2000 in his said business, and a good credit. That the quantity of lumber which he was so enjoined from selling or interfering with, amounted to 100,000 feet of best quality of pine lumber, worth then in the market, $35 per thousand.

That after the issuing and service of said injunction, such proceedings were had in said chancery suit, in said court, as that said injunction was, on the 7th day of August, 1856, unconditionally dissolved by said court; and that at the September term of said court, 1857, said bill was, by said Gorton, dismissed at his own costs.

That said Gorton, at the time of filing said bill and obtaining said injunction, knew that he was not a copartner or joint owner with said Brown in said lumber. That by reason of the commencement of said suit, and procuring and service of said injunction, and the retaining of said injunction from the time of the service up to the time of the dissolution thereof, said Brown was greatly injured, and wholly ruined, in his credit and reputation, and lost the benefit of the sale of his said lumber during the time the said injunction was in force; and said lumber, while the sale thereof was so enjoined, became greatly damaged, rotted, and spoiled, so that at the time of the dissolution of said writ, the same could not be sold in the market for so much per thousand feet into $10 or $15. And that he, said Brown, was also compelled to expend large sums, to wit, $500, in employing counsel to defend said chancery suit, and obtain the dissolution of said writ.

To this declaration Gorton pleaded—

1st. The general issue.

2d. That said cause of action did not accrue within two years preceding the commencement of said suit.

Issue was joined on both of these pleas. And the cause was tried at the October term, 1860, of the Circuit Court of Cook county, before MANIERRE, Judge, and a jury. There was a verdict and judgment for the plaintiff below for two thousand dollars.

On the part of Brown, the plaintiff below, the court gave the jury, among others, the following instructions:

3. If the jury believe, from the evidence, that the defendant

wilfully and maliciously commenced said chancery suit, and caused said writ of injunction to be issued and served, he not being at the time the copartner of the plaintiff, nor having reasonable or probable grounds for believing that he was jointly interested with him in the lumber, then the law is for the plaintiff; and in estimating the plaintiff's damages, the jury are not confined to the exact amount in dollars and cents proven by the plaintiff, but may give such damages as they believe, from the evidence, in view of all the facts and circumstances of the case, the plaintiff has sustained, by reason of the commencement of said suit, and the issuing and service of said writ of injunction.

4. If the jury believe, from the evidence, that the defendant was not, at the time that he commenced said chancery suit, and the issuing and service of said writ of injunction, the copartner of said plaintiff, or jointly interested with him as alleged in his bill, and had no reason or probable ground for believing that he was, and commenced said cause maliciously, then the plaintiff is entitled to recover such damages as the jury believe from the evidence he has sustained, by reason of the issuing of said writ, and the service thereof, and commencement of said chancery suit; and in estimating such damages the jury will consider the condition, as shown by the evidence, of the lumber at the time of the service of said writ, as well as its condition at the time of dissolution of said injunction, and allow such damages, by reason of the injury thereto, as they believe, from the evidence, was sustained by the plaintiff by reason thereof.

5. If the jury believe, from the evidence, that the plaintiff was engaged in the lumber business in Waukegan, prior to and after the time of the commencement of said chancery suit, and issuing and service of said writ of injunction, and had prior thereto established a business and business credit in said lumber trade, and that the defendant, knowing that fact, for the purpose of destroying said business and business credit, commenced a chancery suit against said plaintiff, charging a copartnership to exist between them, or a joint interest in said property, and caused a writ of injunction to be issued and served on said plaintiff and his property, without

probable cause for believing that a partnership existed, for the purpose aforesaid, and that by means thereof said business and credit were injured, then the law is for the plaintiff; and the jury, estimating the plaintiff's damages, are not confined to the exact amount in dollars and cents as shown by the evidence, but may give such damages in addition thereto as they believe, from a just view of the whole case as detailed in evidence, the plaintiff has sustained.

The defendant thereupon requested the court to instruct the jury, among other things, as follows:

6. If the jury believe, from the evidence, that Gorton in good faith supposed himself to be a part owner of the lumber mentioned in the injunction described in plaintiff's declaration in this case, and obtained said writ of injunction for the purpose of protecting what he believed to be his equitable rights, then he had probable cause for commencing said suit and obtaining said writ of injunction, and this action cannot be maintained.

8. If the jury believe, from the evidence, that at the time of filing the bill and suing out the writ of injunction mentioned in the plaintiff's declaration, the defendant Gorton believed in good faith that the allegations in said bill were true, and that he was entitled to the relief therein sought, then he had probable cause for his said action, and this suit cannot be maintained.

Which said instructions the court refused to give as asked, but modified the sixth instruction, by inserting, after the word "faith" in second line, the words "and without wilful ignorance," and by striking out the words "he had probable cause," and inserting in their place the words "this action," in the place of the words so stricken out, and also by striking out the words "and this action," after the word injunction.

And modified said eighth instruction, by inserting after the words "good faith," the words "and without wilful ignorance," and also by striking out the words "he had probable cause for his said action," after the word "then," in the last clause of said instruction.

11. If the the jury believe, from the evidence in this case, that the bill was filed and injunction obtained and served in said plain-

tiff's declaration mentioned, more than two years before the commencement of this suit, then this suit is barred by the Statute of Limitations, and the law is for the defendant.

12. If the jury believe, from the evidence, that the writ of injunction in the plaintiff's declaration mentioned, was dissolved by the court more than two years before the commencement of this suit, then this suit is barred by the Statute of Limitations, and the plaintiff cannot recover.

Which said last two instructions the court refused to give.

Motions for new trial and in arrest, were overruled, on condition that Brown remit five hundred dollars from verdict, which having been done, judgment was rendered on the verdict.

Blodgett & Upton, for appellant.

W. S. Searles, for appellee.

BREESE, J.—Preliminary to all other questions presented by this record, is the question, can this action be maintained? We have searched the precedents and books of pleadings from the earliest times to the present, and find but one case where it has been held, that an action can be maintained for maliciously suing out a writ of injunction. We are well aware that elementary writers and respectable courts have held that an action on the case will lie for an abuse of the process of the courts, where special damages are alleged, and against a party for prosecuting a causeless action prompted by malice, by which the defendant has sustained some injury, for which he has no other recourse or remedy. Such actions, however, for the most part, are actions wherein arrests have been made and bail demanded, or the party put to some other expense and inconvenience, which cannot be compensated in any other mode than by an action. Such actions, except where a malicious arrest is charged, are not favored by the courts, and ought not to be, for, in a litigious community, every successful defendant would bring his action for a malicious prosecution, and the dockets of the courts would be crowded with such suits. Even for instituting a criminal

prosecution, and failing in it, courts regard a subequent action for malicious prosecution with disfavor, for the reason that they have a tendency to discourage just prosecutions for crime. There is little doubt that very many aggravated cases of crime have not been prosecuted, from the dread, in the event of an acquittal, of this action to follow, and damages recovered, ruinous to the prosecutor. But the action will lie, for it is reasonable, that when an injury is done to a person, either in reputation, property, credit, or in his profession or trade, he ought to have an action of some kind to repair himself. Most of the cases we have examined are cases for falsely, maliciously, and without probable cause, suing out process, regular and legal in form, to arrest and imprison another. Such arrest is tortious and unlawful, and the party causing it ought to be answerable in damages for the wrong done, but even in such case, some damage must be alleged and proved.

As we have said, we have found but one case where the action was held to be maintainable for suing out an injunction in chancery, and that was a case decided by the Supreme Court of Kentucky. It is the case of *Cox* vs. *Taylor's Administrators*, and reported in 10 B. Monroe 17.

The declaration in that case was adjudged insufficient, because it did not allege that the injunction or restraining order, whereby the plaintiff was prevented from the proper use and enjoyment of his land, was obtained or caused to be issued or continued without any probable cause therefor. Had this allegation been in the declaration, as it is in the one before us, it would have been sufficient. It was argued by the defendant, that the remedy, by an action on the case, was merged in that on the bond which is given on obtaining an injunction. In reply to this, the court said, that although a bond was given, on obtaining the injunction, that an action upon it, and on the case, are not coextensive or commensurate, either as to the nature of the wrong, or as to the extent or criterion of damages recoverable, and therefore there was no ground for this argument, and the court likened it to a case of official bonds by sheriffs or others, both remedies would exist, and thought the same should be the case with regard to injuries occasioned by injunctions

for which the party might have an action on the case, if no bond were required.

This is the only case we have been able to find going near to sustaining this action. It is a solitary case—it stands alone, and that fact is some evidence that it is out of the track of well-received judicial decisions. On the principle that this action is not to be encouraged, it seems surprising such a decision should have been made, especially where the injured party had a more efficient remedy, and in pursuing which, he would not be required to show a want of probable cause.

We hold the remedy on the bond given on obtaining the injunction, is all the remedy to which the injured party can resort. It is designed by the statute, to cover all damages the party enjoined can possibly sustain, and it is in the power of the judge or officer granting the writ to require a bond in a penalty sufficient to cover all conceivable damages. This bond is a high security which the law requires the complainant in a bill for an injunction to execute, to indemnify the defendant, in case the injunction shall be dissolved. It is a familiar principle, when a party has taken a higher security, his suit must be brought on that security. *Toussaint* vs. *Martinnant*, 2 T. R. 104; *Cutler* vs. *Powell*, 6 Id. 324. The bond becomes, when forfeited, the cause of action, and is intended by the law, to measure the damages of every kind which the party may sustain by wrongfully suing out the injunction in case it is dissolved. It is not at all like the official bonds of sheriffs. They are made payable to the people of the State, not to any particular person, and consequently, do not merge a remedy one may have outside of the bond, and besides, it is the policy of the law to multiply the remedies against public officers. Not so with the injunction-bond, that is made payable to the defendant. He is the only person interested in it. It is his security. It is all the law gives him as his security, and he is bound to sue on the bond. Were no bond given or required, then the action might lie. This action on the case, under the circumstances shown, cannot and ought not to be maintained. It is against public policy. For these reasons, the judgment is reversed.

Judgment reversed.

For the foregoing case we are indebted to the courtesy of Hon. E. Peck, the reporter. We regard the question involved as one of considerable practical importance.

I. It has been regarded as long settled in the English courts of equity, that the suffering party, by reason of the operation of an injunction out of chancery, had no redress by means of an ordinary action upon the case. His only legitimate redress was upon the bond, or what is the English practice, a deposit of money by way of indemnification, if any was required by the judge issuing the injunction. The English courts of equity do not allow costs to the party against whom an injunction had improvidently issued, upon its dissolution, where the party obtaining the injunction had fully stated his case, so that the error in granting the injunction might fairly be said to be that of the court and not the fault of the party. But where the applicant for an injunction fails to maintain the facts upon which it is granted, he becomes liable to costs, and these may be awarded, as between attorney and client. Illingworth *vs.* Manchester and Leeds Railway Co., 2 Railw. Cas. 187. The Lord Chancellor, COTTENHAM, said, "Is the evil which has arisen from the injunction having been made, and the expense of having it discharged, to be attributed to the error of the court, or to the false representation of the case by the plaintiffs? Certainly the latter. The costs were therefore properly given to the defendants." And if the party obtain an injunction upon one state of facts, he cannot, upon failing to prove that, fall back upon another which is proved, and which, if it had been alleged, might have equally entitled him to the injunction. But in such cases costs are sometimes denied. Greenhalgh *vs.* Manch. and R. Railw., 1 Railw. Cas. 68; Attorney-General *vs.* Mayor of Liverpool, 1 Myl. & Cr. 171–210. And it was recently held in an important case, where the question was elaborately examined, that the party obtaining an injunction, and giving bonds in such sum as the court ordered to indemnify the other party against consequential damages, in the event of the suit failing, could not be amerced in damages beyond the amount of the penalty of the bond. Sturges *vs.* Knapp, 33 Vt. Rep. 486.

It was here held, that if the court, in granting the injunction, specially order that the party praying for it, shall respond in damages to the party against whom it is granted, to the full extent sustained by him, then it is competent for the Court of Chancery to estimate the same, by reference to a master, or in any other proper mode, and the same may be recovered by the party to whom they are awarded, by an action at law. In Garcie *vs.* Sheldon, 3 Barbour 232, the court held a different view upon this point, maintaining that the party sustaining damages had no remedy to recover the same unless upon a bond ordered by the court for his indemnity. See also Hall *vs.* Fisher, 20 Barbour 441.

It seems to be agreed on all hands that where there is no order for the payment of damages, and no bond required, there can be no recovery in any form. Lexington and Ohio Railroad Co. *vs.* Applegate, 8 Dana R. 289. This subject is discussed by the United States Supreme Court in Bein *vs.* Heath, 12 Howard U. S. Rep. 168.

II. But upon principle we do not perceive why any of the cases to which we have referred deny redress, where an injunction is obtained upon a state of facts known by the party obtaining it to be false in material particulars, and where there was no probable cause for the proceeding, and this well understood by the party moving it, and where

the thing was moved by mere malice. This is ordinarily a good foundation for an action for malicious suit, and it does not appear from the decided cases, that it is important that the malicious suit should be by an arrest of the body of the defendant. But if that were required, we should regard the duress produced by an injunction out of chancery as fully equivalent. We had occasion to examine the cases upon this general question very extensively in the case of Barron *vs.* Mason, 31 Vermont R. 189. From this examination we should incline to believe that the decision in Cox *vs.* Taylor's Administrator, 10 B. Mon. 17, is entirely well founded in principle, but that in practice no such actions have been instituted, as the courts of equity are entirely competent to deal with offenders of this character in a summary way. I. F. R.

Court of Appeals of New York.

ELIAS W. GROSS *et al. vs.* JOSHUA G. BEARD.

The owner of a vessel is entitled to recover against one who has chartered it or shipped goods on it, for unreasonable and improper delay in unloading the cargo, by which such owner has been for a time unjustly deprived of the use of his vessel, or suffered other damage.

It is usual in charter-parties to insert an agreement that a specified time shall be allowed for loading and unloading, and that it shall be lawful for the freighter to detain the vessel for those purposes a further specified time on payment of a daily sum. And where the contract is thus precise, the shipper of the freight is held strictly to its terms; and accidental delay, such as stormy weather, prohibition of export, &c., though arising from no fault of his, will not excuse him from payment of the demurrage.

But where no period of delay is fixed by the contract, the rule is different. There a reasonable time is implied, and this is to be determined upon in view of all the circumstances legitimately bearing upon the case, and is a question for a jury.

Opinion of the Court by

DENIO, C. J.—The Supreme Court was plainly right in holding that the owner of a vessel is entitled to recover against one who has chartered it, or has shipped goods on board of it, for an unreasonable and improper delay in unloading the cargo by which such owner has been for a time unjustly deprived of the use of his ship, or has otherwise suffered damage. The thorough examination which that question has received at the hands of our learned brother who prepared the opinion of the Supreme Court, appears